Nolan Enterprises, Inc. d/b/a Centerfold Club *and* Brandi Campbell. Case 09–CA–220677

July 31, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 25, 2019, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief. The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. We agree with the judge, for the reasons he stated, that under the common-law agency test as restated in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (*SuperShuttle*), the Respondent failed to meet its burden of establishing that Charging Party Brandi Campbell, a dancer at the Respondent's club, was an independent contractor rather than an employee under the Act.

We reject the Respondent's claim that the judge failed to properly evaluate the common-law factors through the prism of entrepreneurial opportunity, as required under *SuperShuttle*. As the judge recognized, entrepreneurial opportunity "is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 2 (2020) (internal quotations and citations omitted).

Applying this principle, the judge analyzed the record in light of the common-law factors and correctly found that Campbell lacked sufficient opportunity for economic gain to render her an independent contractor. The judge explained that unlike the company in *SuperShuttle*, which allowed drivers a high degree of autonomy, the Respondent exercises significant control over the dancers' day-to-day work (through extensive rules, expectations, supervision, fines, and penalties), their work environment, and the customer base. The Respondent's close governance of dancers' day-to-day work at the club, in turn, results in a significant degree of control over the dancers' opportunities for economic gain. See *SuperShuttle*, supra, slip op. at 9 (explaining that "employer control and entrepreneurial opportunity are opposite sides of the same coin; in general, the more control, the less scope for entrepreneurial initiative, and vice versa"). Although the dancers certainly have some opportunity to influence their income through their own efforts and ingenuity, the Respondent, through various measures described by the judge, substantially limits their entrepreneurial opportunity.

The judge also explained that unlike the drivers in *SuperShuttle*, who made a significant economic investment and faced significant economic risk, the Respondent's dancers make minimal investment and have minimal economic risk.[3] See also *Intermodal Bridge Transport*, supra, slip op. at 2-3 (finding that drivers were not independent contractors in part because they did not have to make a significant initial investment or take on a significant or meaningful risk of loss). Further, unlike the compensation system in *SuperShuttle*, which did not link the company's revenues to the amount of fares earned by drivers, the Respondent's revenue is tied to the dancers' performance. In *SuperShuttle*, drivers paid the company an initial franchise fee and a flat weekly fee, so the company received the same amount from drivers regardless of the fares the

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997), and to conform to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

[3] The judge distinguished *SuperShuttle* in part on the ground that the Respondent guarantees dancers will receive at least $100 per shift every time they lease space, regardless of whether they sell any dances or drinks. To receive the guarantee—which the judge found was unique among area clubs—a dancer must arrive on time for her shift, engage all customers in a full and positive manner, and not bring any safety hazards into areas where customers are located. The Respondent seeks to deemphasize the significance of the guarantee by arguing that the guarantee was optional, and a dancer who did not want it could decide to "not earn any money at all." In fact, however, the record suggests that only one employee, Campbell, opted out of the guarantee, and she took this action only after she complained that the Respondent was treating her and other dancers like employees instead of independent contractors. The Respondent points to no other dancer who declined the guarantee. Further, we note that in its March 11, 2018 letter to Campbell, the Respondent stated that although Campbell was free to earn as much or as little as she wished, she must let the Respondent know if she effectively earned less than $10 per hour so that the Respondent could "insure you earn the state minimum wage." The record thus shows that, in practice, the Respondent substantially mitigates the dancers' economic risks by assuring a minimum level of compensation notwithstanding the fact that dancers could decline the guarantee. Moreover, the Respondent's efforts to ensure that dancers earn the applicable minimum wage also support a finding of employee status, inasmuch as federal and state minimum wage laws only apply to employees. See 29 U.S.C. § 206; Ohio Revised Code § 4111.1 et seq.

drivers earned. 367 NLRB No. 75, slip op. at 3. Here, in contrast, the more the dancers earn in dance fees and drink commissions, the more the Respondent profits. This compensation system militates against independent contractor status.

Moreover, we also agree with the judge that many of the other common-law factors also support a finding of employee status. These include in-person supervision of the dancers' work, which is subject to detailed rules established by the Respondent and enforced through a system of fines that are imposed on a near-daily basis, as well as through verbal warnings and suspensions. The Board has found that "even . . . occasional instances of discipline indicate significant control" by an employer. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015) (citing *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 889, 892–893 (1998)). The judge also correctly found that the dancers are not engaged in a distinct occupation or business and are not rendering services as an independent business. Rather, their work is part of the regular business of the Respondent. Accord *Intermodal Bridge Transport*, supra, slip op. at 3 (employee status found where truck drivers' work was essential part of company's logistics, drayage, and container-storage business). In sum, we find that the judge properly applied the common-law agency test and correctly found that the Respondent failed to prove that Charging Party Campbell was an independent contractor rather than an employee entitled to the Act's protection.[4]

2. We also agree with the judge that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Respondent violated Section 8(a)(4) and (1) of the Act by discharging Campbell for filing unfair labor practice charges against past employers and for threatening to file a charge against the Respondent. The Respondent's challenges to this finding are without merit.

Ample evidence supports the judge's finding that the General Counsel met his initial burden under *Wright Line* to show that Campbell's filing and threatening to file unfair labor practice charges with the Board was a motivating factor in the Respondent's decision to discharge Campbell. The Respondent contends for the first time, on exceptions, that Campbell was not discharged but, rather, that she ended her own employment by abandoning her lease after April 3 (the date of her last performance at the Respondent's club) and moving to another state. Because the Respondent did not raise that argument to the judge, we deem it to be untimely raised and thus waived. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. 325 Fed.Appx. 577 (9th Cir. 2009); *Antioch Building Materials Co.*, 323 NLRB 73, 74 (1997).[5]

Even if this argument were properly before us, however, we would reject it. The record establishes that the Respondent discharged Campbell, and, in its letter doing so, the Respondent did not allege that Campbell had abandoned her job or terminated her lease. The Respondent's general manager, Brenda Bonzo, testified that the sole reason the Respondent provided for discharging Campbell was that she had violated the "no-touch" rule during private dances. The Respondent's April 7, 2018 discharge letter to Campbell cited this same reason; it did not refer to Campbell's having abandoned her job or terminated her lease. Moreover, the credited facts show that, contrary to the Respondent's claim, Campbell did not abandon her job after April 3 (or at any time preceding that date). Indeed, she tried to perform at the Respondent's club on the days immediately preceding her discharge. She showed up at the Respondent's club on April 4–6 but was told by supervisors on two occasions that there was no space for her to perform. The Respondent issued its discharge letter to her the next day, April 7. For these reasons, the evidence clearly establishes that Campbell was discharged.

[4] Regarding the factor of length of employment, we agree with the judge, for the reasons he states, that dancers' testimony about the lengthy duration of their tenures with the Respondent supports a finding of employee status.

We make the following additional observations. The judge described the lease as being for 1 year, and he said that it "automatically renews unless terminated by either party." He further stated that the lease may be terminated at any time by the Respondent based on space availability, or by the dancer if she no longer desires to lease space. We note that the lease states, on its face, that it is "for an initial term of one (1) day from today's date, and shall automatically renew every day for a period of up to one (1) year unless: A. A party desiring not to renew the space lease gives notice to the other party of the intent not to renew at one (1) day prior to the expiration of the initial term or any renewal term; or B. The Lease is not otherwise terminated as provided for in paragraph 11 or 12. C. A[n] Entertainer Tenant can lease space up to one year at a time if there is space available and the Entertainer Tenant or the Property Owner can end this at any time based on space availability or desire to stop leasing space by the Entertainer Tenant." This language states that the lease renews daily and effectively provides that either party may terminate the lease for any reason with 1 day's notice. This creates an arrangement that is virtually indistinguishable from at-will employment. As such, it further supports a finding of employee status for the dancers under the Act.

[5] Although the Respondent, in its answer to the complaint, denied that it discharged Campbell and asserted that it "took no adverse action against" her, it did not pursue this assertion at the hearing or in its posthearing brief to the judge. In its posthearing brief, the Respondent argued only that Campbell was an independent contractor and that, regardless, her discharge was lawfully motivated. The Respondent did not argue, as it does here for the first time, that Campbell never received her April 7, 2018 discharge letter in the mail and that she had resigned by abandoning her employment and leaving Ohio.

The Respondent's remaining arguments are equally unavailing. The Respondent does not specifically challenge the judge's finding that Campbell engaged in protected charge-filing activity and that it was aware of her activity. Nor does the Respondent specifically challenge the evidentiary grounds on which the judge based his finding of animus against Campbell's protected activity—and in any event, the record, taken as a whole, fully supports the judge's finding. Rather, the Respondent argues, without merit, that it had been willing to address Campbell's workplace complaints and that this willingness undercuts the judge's finding that it acted out of animus toward her prior charge filing and her threat to file a charge against the Respondent. The Respondent's contention is unavailing. Although the Respondent did address some of the complaints that Campbell raised in her March 12, 2018 letter, it contemporaneously learned about her prior Board charges and settlements and, thereafter, embarked on an animus-driven course of conduct that culminated in her discharge.[6]

We also agree with the judge that the Respondent failed to establish that it would have discharged Campbell even in the absence of her protected activity because she violated State law by touching a patron. As the judge found, on March 22, 2018, Campbell touched one patron's arms and shoulders and another patron's beard. Once the General Counsel has met his initial burden under *Wright Line*, however, the employer does not sustain its defense burden merely by establishing a legitimate reason for its adverse employment action. Rather, it must prove that it would have taken that action even in the absence of the employee's protected activity. See, e.g., *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). Contrary to the Respondent, the judge properly found that the Respondent's limited and conclusory evidence was insufficient to establish that it would have discharged Campbell for touching patrons even in the absence of her protected activity.[7]

ORDER

The National Labor Relations Board orders that the Respondent, Nolan Enterprises, Inc. d/b/a Centerfold Club, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they filed or threatened to file unfair labor practice charges with the Board or gave testimony under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Brandi Campbell full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Brandi Campbell whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Brandi Campbell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Brandi Campbell and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Columbus, Ohio facility copies of the attached notice marked "Appendix."[8] Copies of the notice,

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[6] We also note that, contrary to the Respondent's assertion, there is no requirement under *Wright Line* that the General Counsel must establish his initial case through evidence of disparate treatment.

[7] In affirming the judge's finding that the Respondent did not meet its *Wright Line* defense burden, we find it unnecessary to rely on the judge's statement, citing *East End Bus Lines, Inc*., 366 NLRB No. 180, slip op. at 2 (2018), that where there is strong evidence of discriminatory motivation, an employer bears a "substantial" defensive burden. We agree with the judge that there is strong evidence of discriminatory motivation here, but in evaluating whether the Respondent sustained its defense burden under *Wright Line*, we have considered whether the Respondent established its defense by a preponderance of the evidence. Applying that standard, we find that the Respondent fell far short of meeting its defense burden, for the reasons discussed by the judge.

[8] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to

on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you filed or threatened to file unfair labor practice charges with the Board or gave testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Brandi Campbell full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Brandi Campbell whole for any loss of earnings and other benefits resulting from her unlawful discharge, less any net interim earnings, plus interest, and WE WILL also make Brandi Campbell whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Brandi Campbell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for Brandi Campbell.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Brandi Campbell, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

NOLAN ENTERPRISES, INC. D/B/A CENTERFOLD CLUB

The Board's decision can be found at https://www.nlrb.gov/case/09-CA-220677 or by using the

work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Zuzana Murarova, Esq., for the General Counsel.
Christina L. Corl, Esq., for the Respondent.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried on January 28–29 and February 13, 2019, in Columbus, Ohio, based on allegations that Nolan Enterprises, Inc. d/b/a Centerfold Club ("Respondent") violated Section 8(a)(1) and (4) of the National Labor Relations Act ("Act") when it discharged dancer/stripper Brandi Campbell on around April 5, 2018,[2] because she engaged in statutorily protected activities.

Campbell is a self-described labor activist who has performed at gentlemen's clubs across the country. She maintains a website, *stripperlaborrights.com*, where she blogs about her experiences and provides dancers with information about their legal rights, including their rights under the Act. Additionally, between 2015 and 2017, Campbell filed unfair labor practice charges against clubs in Nevada, Minnesota, and Wisconsin, alleging that they discriminated/retaliated against her for engaging in statutorily protected activities and deprived dancers of their statutory rights by misclassifying them as independent contractors. Campbell blogged about these charges and their outcomes on her website. They also were the subject of multiple online news articles.

On February 24, Campbell began performing as a dancer/stripper at the Centerfold Club. At the time, she signed documents stating she wanted to "lease space" as an "entertainer tenant" (i.e., independent contractor), not an employee. On about March 12, Campbell wrote and hand-delivered a letter to Respondent's owner complaining about how staff at the Club was treating her and other dancers like employees, not independent contractors, by requiring them to abide by certain rules and expectations that she believed she should not need to follow if she was truly an independent contractor. At some point, Respondent discovered Campbell's website and the online articles addressing her prior charges, and it determined she likely intended to file charges against the Club to try and obtain another monetary settlement. Less than a month later, Respondent sent Campbell a letter terminating her lease agreement, stating that she had been caught on video violating Ohio's "no-touching" law, which broadly prohibits dancers from touching patrons while performing.

The General Counsel's complaint alleges Respondent discharged Campbell: (1) because she previously filed unfair labor practice charges against other employers and threatened to file a charge against Respondent, in violation of Section 8(a)(4) and (1) of the Act; and (2) because she engaged in, or Respondent believed she engaged in, protected concerted activities when she submitted her March 12 letter, in violation of Section 8(a)(1) of the Act. Respondent denies the allegations and argues Campbell was an independent contractor and, therefore, not a statutory employee entitled to the protections of the Act. Alternatively, Respondent contends that, even if she was a statutory employee, there was no violation because it terminated her lease for legitimate, nondiscriminatory reasons, and it would have done so irrespective of any statutorily protected activities.

For the reasons stated below, I find Campbell was a statutory employee and Respondent discharged her because she engaged in statutorily protected Board activities, in violation of Section 8(a)(4) and (1) of the Act.

II. STATEMENT OF THE CASE

Campbell filed the instant charge on May 21, and she later amended it on August 27. On September 28, the Regional Director for Region 9, on behalf of the General Counsel of the National Labor Relations Board, issued a complaint based on the original and amended charges. Respondent filed its original answer on November 22, and its amended answer on December 17, denying the alleged violations and raising various affirmative defenses.

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings, conclusions of law, and recommended order.

III. FINDINGS OF FACT[3]

A. Jurisdiction

Respondent is a corporation with an office and place of business in Columbus, Ohio, where it is engaged in the business of

[1] Abbreviations herein are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits; "GC Br." for General Counsel's brief and "R. Br." for Respondent's brief.

[2] All dates refer to 2018, unless otherwise stated.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited evidence, or because it was incredible and unworthy of belief.

providing live adult entertainment. In conducting its operations during the 12-month period ending September 1, Respondent derived gross revenues in excess of $500,000 and, during this same time period, purchased and received goods valued in excess of $5000 from other enterprises, including Sam's Club, located within the State of Ohio, each of which other enterprises had received these goods from points outside the State of Ohio. Respondent admits, and I find, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. Agency and Supervisory Status

At all material times, Fred Tegtmeier (owner) and Brenda Bonzo (general manager) were admitted supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act, respectively. (GC Exh. 1(e) and (h).)[4] At all material times, Jamie Stevenson (shift supervisor) and Greg Flaig (human resources consultant) were agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(e) and (h).)[5]

C. Background

1. Respondent's operations, personnel, and layout

Respondent operates a gentlemen's club near the Columbus airport featuring topless female dancers ("the Club"). The Club has two elevated stages, a full-service bar, a kitchen, a seating area, offices, a dressing room, and private back rooms. In addition to the dancers, Respondent employs security guards, bartenders, kitchen staff, servers, disc jockeys ("DJ"), back-room attendants, supervisors, and managers.

Dancers perform seven afternoons/nights a week. Afternoon shift for dancers is around 4 p.m. to 10 p.m., except for Sundays when the Club is open from around 7 p.m. to 2:30 a.m. Night shift for dancers is around 8 p.m. to 2:30 a.m.

Upon entering the Club, on the left, there are public restrooms, a vending machine, and an ATM. There are security guards near the entrance who check identification, collect any cover charge, and wand patrons down for weapons or contraband. On the right, there is the bar area with bartenders who serve drinks, and a seating area with chairs and tables. Beyond the seating area, there is the large main stage with a dancing pole. Behind the main stage, on a corner, is the smaller backstage with two railings. There is a DJ near the stages who plays music, introduces the dancers, and promotes drink and dance specials.

In the left corner of the room, there is the back hallway leading to ten semi-private and private dance rooms. There is a back-room attendant at a podium near the entrance to the hallway. The back-room attendant handles and records the private-dance transactions and watches the activities in the back rooms. Each room has a video camera. The feed from the cameras is shown on monitors at the back-room attendant's podium and in the back office where the managers are located. Near the back office is the kitchen, the dancers' dressing room, and the employee restroom. There also is an outside patio for dancers to take their smoking breaks.

2. Applicable Ohio laws and regulations

As a gentlemen's club, Respondent is considered a "sexually oriented business" under Ohio Revised Code ("O.R.C.") Sec. 2907.40(a)(15), which means its dancers are subject to the State's "no-touching law," stating, in pertinent part, that:

> No employee [which, by definition, includes independent contractors] who regularly appears nude or seminude on the premises of a sexually oriented business, while on the premises of that sexually oriented business and while nude or seminude, shall knowingly touch a patron who is not a member of the employee's immediate family . . . or the clothing of a patron who is not a member of the employee's immediate family . . . or allow a patron who is not a member of the employee's immediate family . . . to touch the employee or the clothing of the employee.

O.R.C Sec. 2907.40(C)(2).[6]

Additionally, Respondent has a permit to sell alcohol on its premises. As such, it is subject to Ohio Administrative Code ("O.A.C.") Sec. 4301:1–1–52, which prohibits permit holders from knowingly or willfully allowing in and upon its premises any persons to engage in any disorderly activities, appear in a

[4] Tegtmeier died in September. Following his death, Bonzo was named the executor of his trust/estate. She has since assumed control over the Club and Tegtmeier's other businesses, including a pool hall.

[5] The complaint alleges Stevenson and Flaig were both statutory supervisors and agents. In its answers, Respondent denies their supervisory status but does not address their agency status. Sec. 102.20 of the Board's Rules and Regulations requires that a respondent must "specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial" and that allegations not answered or denied or explained as required "will be deemed to be admitted to be true and will be so found by the Board, unless good cause to the contrary is shown." Respondent was made aware of this requirement at the hearing. (Tr. 807–809.) As further evidence of his agency status, I will note that Flaig prepared and signed Respondent's initial answer in this case.

[6] Under the statute, if a dancer touches a "specified anatomical area" of a patron--which is defined as the genitals, pubic region, and buttocks and female breast below a point immediately above the top of the areola--or the clothing covering such area, she commits a first-degree misdemeanor. O.R.C. Sec. 2907.40(A)(16) and (E). If a dancer touches an area, or the clothing covering an area, other than a specified anatomical area, she commits a fourth-degree misdemeanor. O.R.C Sec. 2907.40(E).

Recently, Ohio's "no-touching" law was the subject of newspaper and magazine articles after police arrested adult film star Stormy Daniels for allegedly touching patrons while performing in July at a Columbus strip club. See e.g., Balmert, J. (2019). "Officers Were Warned About Problems with Ohio's 'No-Touch' Strip Club Rule Before Stormy Daniels' Arrest." *The Cincinnati Enquirer*. [online] Available at: (www.cincinnati.com/story/news/politics/2019/03/11/before-stormy-daniels-arrest-ohio-police-warned-against-no-touch-law); Schmidt, S and Bever, L. (2018). "Stormy Daniels Was Arrested and Accused of Touching Strip-club Patrons. The Charges Were Dismissed." *The Washington Post*. [online] Available at: (www.washingtonpost.com/news/morning-mix/wp/2018/07/12/stormy-daniels-is-arrested-at-an-ohio-strip-club-michael-avenatti-says); Bryant, K (2018). "The Bizarre Ohio Law That Led to Stormy Daniels's Arrest." *Vanity Fair*. [online] Available at: www.vanityfair.com/style/2018/07/stormy-daniels-arrest-strip-club-law-ohio). See also Johnson, A. (2017). "Ohio's Strip Club Law Rarely Cited Over Last Decade." *The Columbus Dispatch*. [online] Available at: (www.dispatch.com/news/20170930/ohios-strip-club-law-rarely-cited-over-last-decade).

state of nudity, engage in sexual activity, or commit public indecency.[7]

3. Application, audition, and the choice

Dancers are not required to have any prior dance training or experience to perform at the Club. However, they must fill out an application and audition. The application asks for the dancer's personal information, employment history, and availability to perform during the week.[8] (GC Exh. 2). The audition is in front of a manager or supervisor. Prior to the audition, the dancer is advised of certain rules, including that she must wear opaque tape to cover her entire nipple and areola area (referred to as "nipple tape"), and she must wear a garter on her thigh for patrons to place any tips, while she is performing.[9] The purpose of the audition is to decide whether the dancer is a good fit, which, according to one former supervisor, primarily involves assessing her appearance and whether she can walk in heels. (Tr. 39–44.)

If the audition is successful, the dancer is given the choice of whether she wants to be an employee or an entertainer tenant. (Tr. 322; 508–510; 532–533; 555, 572.) There is little evidence about how dancers are presented with this choice. As discussed below, one of the documents Respondent gives dancers as part of their lease is a side-by-side comparison of their rights and responsibilities based on whether they are an employee or an entertainer tenant. Each of the dancers who testified chose to be an entertainer tenant, and there is no evidence of any current dancer at the Club choosing to be an employee.

4. Lease documents

Dancers who elect to be entertainer tenants "lease space" at the Club. They receive a set of lease documents, sometimes, referred to as a contract, that they review and sign. Respondent's general manager, Brenda Bonzo, describes these documents as the "rules and regulations" the dancers must follow, otherwise there would be "complete chaos." (Tr. 610–611.)

The documents consist of 15 parts. Part 1 is a one-page document stating the dancer wants to lease space as an entertainer tenant and not be an employee. (GC Exh 21, p. 1.)

Part 2 is the 10-page entertainer tenant lease space agreement setting forth the respective rights and responsibilities of Respondent and the dancer. (GC Exh. 21, pps. 2–10.) It states the dancer has a non-exclusive right to lease space to perform live seminude artistic/fantasy dance and associated activities for patrons at the Club.

The lease is for 1 year and automatically renews unless it is terminated. The lease may be terminated at any time by Respondent based on space availability, or by the dancer if she no longer desires to lease space. (GC Exh. 21, pp. 2–3).

As far as scheduling, the agreement states the dancer may lease space on any date(s) she desires, but she must notify Respondent of those selected dates at least 1 week in advance. The dancer may lease space on dates other than those requested, but only if space is available. (GC Exh. 21, p. 3.) When the dancer leases space, she agrees to perform for at least 4 consecutive hours during her leased space time. If she decides not to perform on a day/night she scheduled to lease space, she must notify Respondent at least 1 day in advance. If she misses an entire period of leased time, she must pay Respondent $50 for each day/night she missed. (GC Exh. 21, p. 3.)

The lease states the dancer had no right to sublease her rights to use the premises or to assign the space lease or any other rights and obligations contained in it to any other person without the express written consent of Respondent. (GC Exh. 21, p. 7.)

The agreement refers to rents and dance fees. Rent is the amount dancers pay to lease space and perform on stage. The rent amount is a flat $14 per day/night, and it is paid or deducted at the end of the dancer's shift. Of that $14, $2 is for the "nipple tape" Respondent provides the dancers, and $2 is for "legal fees" that are deducted and paid to the "organization" employing Respondent's human resources consultant, Greg Flaig. (Tr. 93–94.)

[7] The term "sexual activity" includes sexual conduct or sexual contact. "Sexual contact" includes any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person. O.R.C Sec. 2907.01(A) and (B). The term "nudity" includes the showing of the female genital, pubic area or buttocks with less than a fully opaque covering, and/or the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola. O.A.C Sec. 4301:1–1–52(A)(2).

[8] There is a dispute as to whether dancers must commit to a work schedule and/or work a specified number of shifts per week. As discussed below, dancers may request to perform certain shifts on certain days, and Respondent always has dancers performing when the Club is open. If there are not enough dancers scheduled for a shift, Respondent's supervisors will contact dancers to see if they are able to come in and perform. However, I find Respondent does not require that dancers work any set number of shifts or days.

[9] There is a dispute as to whether Respondent informs dancers about Ohio's "no-touching" law when they start at the Club. Based on the credible evidence, I find Respondent tells dancers that Ohio prohibits illegal dancing/touching, but it does not inform the dancers that the law prohibits *all* touching. I base this finding, in part, on the testimony of Jamie Stevenson, who was one of the supervisors who oversaw the dancers and gave them instructions when they started performing. She credibly testified she was unaware of a law or rule completely prohibiting dancers from touching patrons. (Tr. 269.) She further testified she regularly saw on the monitors dancers touch patrons, in a non-sexual manner, during private dances:

> Q: And how often would you see some kind of touching or grazing on those videos when working back there?
>
> A: In every single dance. Like I said, I wasn't aware that that was violating any law, so I never stepped in to correct. The only instruction I had to step in is if, like I said earlier, there were excessive groping or excessive grinding or touching of yourselves and simulating a sex act.

(Tr. 278.)

Additionally, as discussed below, Respondent provides dancers with numerous written documents as part of the lease, and none made clear that any and all touching was illegal. The one document addressing the topic of touching under Ohio law refers to "sexually touching" a patron. (GC Exh. 21, p. 20.) I find that if Respondent clearly and consistently informed dancers that Ohio broadly prohibits any and all physical contact with patrons or their clothing, there would be little reason to separately advise them of the narrower statute prohibiting "sexual" touching, because one would encompass the other.

(Tr. 770–771.) There is no explanation for these "legal fees" or why they are included in the rent.

Dance fees are what the dancer pays each time she uses a back room at the Club to perform a private dance. (GC Exh. 21, p. 3.) As stated, the back-room attendant handles and records these transactions. The patron must pay the attendant for the dance, and the attendant deducts Respondent's fee/split for the dance and gives the remainder to the dancer.[10] As discussed below, Respondent sets these fees/splits, and they vary depending on the timing and length of the dance.

According to the agreement, Respondent has no right to direct or control the nature, content, character, matter or means of the dancer's performance, as long as the dancer performs live seminude artistic/fantasy entertainment. Respondent also has no control over the dancer's costumes or apparel, but the costumes and apparel must comply with all applicable laws and regulations. (GC Exh. 21, p. 6.)

The lease may be terminated without notice in the event of a "material breach." This includes, but is not limited to, the dancer's failure to comply with applicable laws and regulations and/or engaging in unlawful behavior while on the premises. (GC Exh. 21, pp. 4, 6.)

Part 3 is a one-page waiver releasing Respondent of any liability for duties normally required of employers, such as reporting income and making employment-related deductions and withholdings. (GC Exh. 21, p. 11.) Part 4 is a one-page document stating the dancer is exclusively responsible for all payments or contributions required by federal, state, or local laws (e.g., taxes, workers compensation, social security, etc.). It also states the dancer will carry her own personal liability insurance. (GC Exh. 21, p. 12.) Part 5 is the previously mentioned document listing the dancer's rights and responsibilities as an entertainer tenant versus as an employee, and it ends with the dancer again verifying she wants to be an entertainer tenant. (GC Exh. 21, pp. 13–14.) Part 6 is a one-page document confirming the dancer is authorized to work in the United States. (GC Exh. 21, p. 15.) Parts 7, 8, 9, and 10 are individual documents stating the dancer agrees to abide by Respondent's policies against drug use or possession, sexual harassment, underage drinking, and smoking. (GC Exh. 21, pp. 16–19.)

Part 11 is a one-page document entitled, "Entertainer Tenants State Liquor Laws Sign Off," stating the dancer agrees to comply with Ohio's liquor laws. It specifically states Respondent will cancel the lease of any entertainer tenant caught "sexually" touching a patron while on the premises. (GC Exh. 21, p. 20.) There is no corresponding policy or document describing Ohio's broader "no-touching" law.

Part 12 is a one-page document with the "conditions of space lease usage." The document states dancers must arrive at the Club and be ready to perform at the start of their leased time; they must check in with the DJ or property manager when ready to begin performing; they must never to miss their turn on stage; they must entertain while on stage; they must go to the dressing room immediately when called by the DJ or manager; they must participate in all leased space stage shows; and they must pay all amounts owed, and have the manager's approval, before leaving the premises. (GC Exh. 21, p. 21.)

Part 13 is a one-page document addressing "assistance fees." It states the dancer agrees to pay fees to those who assist her in pursuing her business, including the floor men, security, DJs, house moms, and others. The agreement states the dancer "will do this voluntarily" and that she is "free not to lease space here if [she is] unwilling to [do so.]." (GC Exh. 21, p. 22.)

Part 14 is a one-page document stating the dancer agrees to take a breathalyzer test if she is driving home from the Club. If she fails to pass the test, she agrees not to drive her vehicle, and if she drives the vehicle without Respondent's permission, her lease will be terminated. (GC Exh. 21, p. 23.)

Part 15 is a one-page document stating the dancer agrees to earn, on average, above the minimum wage on a weekly basis. (GC Exh. 21, p. 24.) However, as discussed below, Respondent has a separate "entertainer-tenant guarantee" that ensures dancers earn above the hourly minimum wage if they comply with certain requirements.

5. Dancers' compensation

Dancers have four possible sources of income while performing at the Club: tips, dance performance fees, drink commissions, and the entertainer-tenant guarantee.

Tips are the moneys dancers receive directly from patrons while performing on stage. Aside from paying their rent, dancers are not required to share their tips with the Club or staff.

Dance performance fees are a portion of the money patrons pay for private dances. As stated, the patron may not pay the dancer directly for a private dance. Instead, the patron pays the back-room attendant. Respondent sets the minimum prices the dancers may charge for private dances, and it sets the fee/split the dancer pays to use the back rooms. Both the minimum prices and the fees/splits vary depending on the length of the dance, the time of day, and the day of the week. (GC Exh. 3.) For example, according to Respondent's posted list, a private dance on Sunday through Tuesday, lasting three songs, costs a minimum of $30. The $30 is split with the dancer receiving $21, and the Club receiving $9. A private dance on Wednesday through Saturday, after 9 p.m., lasting two songs, costs a minimum of $40. The dancer receives $26, and the Club receives $14. The dancer can negotiate an amount above the minimum price, but she cannot charge below it. If the patron agrees to pay above the minimum price, Respondent's split/fee for use of the room remains the same as if the patron paid the minimum price.

Drink commissions are paid when a patron "purchases" a drink for a dancer.[11] The patron pays an inflated price for the drink, and the dancer receives a 50- or 60-percent commission

[10] Patrons may not use credit credits except to purchase "Centerfold Money," which may be used like cash for purchases in the Club. Centerfold Money is sold only at the bar, and it is kept in a safe. (Tr. 77–79.)

[11] Under Ohio law, dancers may not ask a patron to buy them a drink. Respondent will have a bartender or server approach the patron while he/she is with the dancer and ask if they want to buy a drink and if they also want to buy the dancer a drink. If the patron agrees, the bartender or server explains the different pricing categories for the dancers' drinks, which are sold in increments of $5. Dancers are not required to consume alcohol and can select a nonalcoholic beverage. (Tr. 80–82.)

on that price. For example, when a patron purchases a shot of tequila for himself and a shot of the same tequila for the dancer, his shot would cost $10 and the dancer's shot would cost $20; the dancer receives a commission of $10-$12 on that shot. (Tr. 82–83.) The bartenders keep the "drink tickets" showing when a patron purchased a dancer a drink, and Respondent pays the dancer her commissions on those tickets at the end of her shift.

The "entertainer-tenant guarantee" is a promise Respondent makes that each dancer will earn a certain amount every time she leases space, or the Club will pay the difference between what the dancer earned and the guarantee. The current guarantee is $100 per shift. (Tr. 329). To receive this guarantee, the Club requires the dancer arrive on time for her shift, engage all customers in "a full and positive manner," and not bring any safety hazards, such as cell phones or boots, into areas where the customers are located. (GC Exh. 21, p. 25.) This guarantee is not offered by other clubs in the area. (Tr. 91.)

6. Unwritten rules and expectations for dancers

In addition to these lease documents, Respondent has unwritten rules and expectations for dancers. For example, when the dancer arrives at the Club to perform, she must sign in with the DJ and write down the make and model of her car, or if she took a cab. She then checks in with the bartender who provides her pre-cut pieces of "nipple tape" that she must apply. (Tr. 347–348.) Once the dancer is ready to perform, she must notify the DJ. The DJ sets the rotation the dancers must follow while performing on stage. If a dancer wants to skip or switch her turn, she must notify the DJ or a manager. (Tr. 201–202.)

Respondent requires that dancers wear a garter and heeled shoes.[12] The stated reason for the garter is so patrons do not remove or damage a dancer's clothes trying to give her tips while dancing, and the heeled shoes are because there may be broken glass on the floor. Although not required, Respondent encourages dancers to wear high-heeled shoes, and it discourages dancers from wearing leather, hats, or longer boots out of concern it would attract a "biker" crowd to the Club. Additionally, managers and supervisors make individual suggestions to dancers about changing their appearances, including their make-up, eyewear, etc. (Tr. 56–59.) They also make suggestions to dancers about how to appear friendlier and more approachable to patrons. (Tr. 362).

While on stage, the dancer must perform for two songs (no more, and no less), and she must remove her top within the first minute of the first song. If the dancer fails to do so, a manager or supervisor will remind her. (Tr. 63–64.) The dancer may not leave the stage and perform out in the seating area. She also may not use any props and/or engage in tandem dancing (without permission). (Tr. 50; 55–56). As for music, the dancer can request the DJ play certain songs, but they must be of the classic rock or rock genre; hip-hop and rap music are not allowed. (Tr. 48–49.) (Tr. 349–350.)

Dancers must participate in "Up-time" dance promotions. These occur twice an hour when the DJ calls all dancers up on stage, introduces them, and announces a limited-time private dance special (e.g., two songs for the price of one). Following the announcement, each of the dancers must go out and talk with each of the patrons to try to sell a private dance. (Tr. 351–352.) Dancers may not sit during Up-time. If a manager or supervisor sees a dancer sitting, he/she will tell the dancer to stand up and go mingle with the patrons.

There are other miscellaneous rules or expectations. For example, dancers must sign up to take smoking breaks, and only two dancers can be on break at the same time. Also, Respondent does not allow dancers to loiter in the dressing room. If a manager sees a dancer spending too much time in the dressing room, he/she will tell the dancer to go out and mingle with the patrons. (Tr. 68–70.) Dancers also must get permission from a supervisor or manager before using the public restrooms, and they may not accompany a patron out to the ATM, purportedly for safety reasons. (Tr. 50–51) (69–70.) Also, if a patron purchases a dancer a drink, Respondent expects the dancer to sit and converse with the patron. The more expensive the drink, the longer the dancer is expected to sit and talk with the patron. Respondent discourages dancers from drinking quickly, in the hopes that the patron will buy them another drink. (Tr. 85–86.)

7. Fines and penalties

Respondent penalizes dancers for attendance. For example, if a dancer arrives late for the start of her leased time, the Club issues her a fee or fine of between $5 and $25, depending on the arrival time. (Tr. 744–749.) From late February through mid-to-late March, Respondent's records reflect that it issued "late fees" to dancers on an almost daily basis. (GC Exh. 27.) Respondent also issues a fee or fine if a dancer leaves before the end of her leased time. (Tr. 92–95.) A dancer can be fined up to $200 for leaving before the end of her leased time. (Tr. 92.) Respondent tracks these fines and fees on index cards that it keeps in a box behind the bar, and it determines whether the fine/fee is taken out all at once or over time. (Tr. 92–93.) Respondent gives new dancers a 2-week grace period before issuing them any fees or fines. (Tr. 810–811.)

Respondent disciplines dancers for inappropriate behavior, such as failing to wear a garter, not having tips placed in the garter, or "excessive grinding" during a dance. (Tr. 51–53.)[13] The discipline can be a verbal warning, or it can be a fine, depending on the offense. If the offense is more severe, such as fighting, stealing, bringing drugs or alcohol into the Club, or being drunk or under the influence while at work, the dancer can be suspended ("no-spaced") or banned from performing at the Club. (Tr. 223–224; 733–734.)

[12] Respondent argued Ohio requires dancers to wear garters, but it did not cite to any statute, regulation, or ordinance addressing this requirement. I find the requirement arguably could be encompassed by Ohio's no-touching law, which also prohibits patrons from touching the dancers or their clothing.

[13] Stevenson described "excessive grinding" as when, during a private dance, the dancer's buttocks is grazing the patron's pelvic area for longer than three seconds. She testified her understanding was that a dancer could graze but she was not to "make a home out of it." She stated if a dancer is grazing and moving along, that's one thing, but if she is "sitting there grinding on his pelvic area," that was not allowed. (Tr. 52–53.) She further stated that dancers initially received verbal warnings and then fines for this conduct.

A. Alleged Unfair Labor Practices

1. Background

Brandi Campbell began performing as a dancer/stripper in 2006, and she has since performed at over 70 gentlemen's clubs across the country. As stated, she maintains a website called *stripperlaborrights.com* where she blogs about her experiences, shares her opinions,[14] and provides other dancers/strippers with information, including about their rights under the Act. She writes extensively about how clubs deprive dancers/strippers of their legal rights, often by misclassifying them as independent contractors. On that point, she discusses, in detail, the tests the courts use to determine whether an individual is an employee or an independent contractor.

Additionally, between 2015 and 2017, Campbell filed unfair labor practice charges against four of her former employers, Larry Flynt's Hustler Club in Las Vegas, Nevada (Case 28–CA–153557), the Seville Club in Minneapolis, Minnesota (Case 18–CA–183731), Déjà Vu in Minneapolis, Minnesota (Cases 18–CA–188380 and 18–CA–194102), and Silk Exotic in Madison, Wisconsin (Case 18-CA–200412). In these charges, she claims all four clubs discriminated/retaliated against her because she engaged in statutorily protected activities. She also alleged that three of the clubs deprived her and other dancers of their rights under the Act by, in part, misclassifying them as independent contractors. Campbell eventually settled these charges, some of which included monetary payments to her. Campbell discusses the charges and settlements on her website. She also was interviewed for, or mentioned in, several articles, available online, in which she discusses the outcomes of her Board charges.

2. Leasing space at the Club and March 12 letter

On February 24, Campbell applied to perform at the Centerfold Club. Following a successful audition, she elected to lease space as an entertainer tenant. Although she signed the lease documents, she was not given a copy to keep.

Over the next few weeks, Campbell performed at the Club approximately four times per week. During this time, she spoke to other dancers about the conditions at the Club, including about scheduling, leaving early, Up-time, and other topics, and she informed some of the dancers about her website.

On around March 12, Campbell prepared and hand-delivered a typed letter to Respondent's owner, Fred Tegtmeier, complaining that the staff was treating her and other dancers like employees, not independent contractors. (GC Exh. 4.) Among the complaints she raised in the letter were that Respondent's staff was requiring dancers to participate in Up-time, setting the prices dancers could charge for private dances, telling her how to communicate with patrons, mandating that dancers order drinks and sit with patrons while consuming the drinks, requiring that dancers get permission to use the public restroom, prohibiting dancers from leaving the Club early, barring dancers from accompanying patrons to the ATM, and telling dancers not to loiter in the dressing room. She stated she should no longer be bothered by these rules if she truly was an independent contractor. Campbell concluded the letter by requesting a copy of her lease, stating "regardless of what the contract says, Federal law dictates the protections of dancers and how much control [the Club is] allowed to exert over us while still calling us contractors."

Toward the end of the night, Tegtmeier called Campbell back to his office. He told her that if he allowed her to make the changes she mentioned in her letter, then the other dancers were going to want those changes too. He explained that he had a certain way of running his business, and it was not going to be good for business if the dancers did not follow the rules. He stated, for instance, that if the Club did not schedule dancers, they all would want to come in at 10 p.m. and leave at midnight, and there would be no dancers the rest of the hours the Club was open. (Tr. 391–392.) The conversation lasted for about 15-20 minutes, and Campbell then left to cash out for the night.

A day later, Tegtmeier, Bonzo, and Respondent's human resources consultant, Greg Flaig, met with Campbell regarding her letter. Flaig went through and addressed the issues she mentioned in her letter, and he proposed making certain changes for her, including: not requiring her to participate in Up-time because of (nonexistent) health reasons; allowing her to wear ballerina slippers, as opposed to heels, if she released the Club from liability for any injury she might receive; and allowing her to negotiate higher dance prices. Following the meeting, Flaig wrote Campbell a letter outlining the changes. Flaig also stated that because Campbell told Tegtmeier that other dancers had the same concerns as her, Respondent was going to hold meetings with all the dancers regarding her letter and the Club's response. Flaig invited Campbell to attend and speak at those meetings. (R. Exh. E.)[15]

3. Respondent learns about Campbell's website and Board activities

At around this time, shift supervisor Jaime Stevenson learned about Campbell's website from the other dancers, and she reported it to Flaig and Bonzo. The three reviewed the website. Stevenson and Flaig also began "googling" Campbell to learn more about her and her motives. They quickly discovered newspaper articles about Campbell's prior Board charges and other lawsuits. One article from the *Minneapolis Star Tribune* provided a detailed discussion about Campbell's charges against the Seville Club and Déjà Vu, and the eventual settlement of those charges, which included monetary payments to Campbell. (GC Exh. 6). They also found articles, including one from the *Atlanta Journal-Constitution*, discussing Campbell's charges against Larry Flynt's Hustler Club in Las Vegas. This article discussed those charges, and their eventual settlement, as an example of the type of lawsuits dancers were pursuing individually and collectively against clubs across the country. (GC Exhs. 8, 9, and 10.)

[14] Much of the website consists of Campbell's vitriolic, personal attacks on individuals she worked for or with who she believed wronged her or others or failed to support her efforts to address issues at the clubs.

[15] At their meeting, and in his letter, Flaig refers to "SB16" and "Rule 52." These refer to the legislation that lead to the Ohio statute covering sexually-oriented businesses and the regulation covering clubs with liquor permits. At the meeting, Flaig told Campbell they concerned "touching and drugs," but he did not provide any additional information. There was no contention at the meeting or the letter that Campbell was violating either the statute or the regulation by engaging in inappropriate touching of patrons.

Flaig and Stevenson shared and discussed the information they found with Tegtmeier and Bonzo. Flaig, Stevenson, and Bonzo all continued to monitor Campbell's website over the next several weeks.[16]

Stevenson and Bonzo also began monitoring Campbell's interactions with other dancers while she was at the Club. If they saw her talking to other dancers, they would go over and break up the conversations, or, if the dancer(s) was someone management trusted, they would allow the conversation to continue and later ask the dancer(s) what was discussed. (Tr. 135; 258–259.)

4. Mandatory meetings

In around mid-March, Flaig, Tegtmeier, Bonzo, and Stevenson held mandatory meetings with the other dancers and staff to discuss Campbell's March 12 letter, and its response to the concerns she raised. Campbell did not attend any of those meetings.

In these meetings, Flaig went through the letter and the Club's response. There were dancers who spoke up during these meetings who were upset that Campbell had written the letter on their behalf, and they stated they did not agree with the contents. Flaig told them they were not to retaliate against Campbell, and they should just avoid her. He stated the Club did not know what Campbell was attempting to accomplish with her letter, but based on her history, she appeared to be a fan of class action lawsuits. Flaig explained Campbell has gone after smaller clubs and bigger clubs, and he believed she was trying to make a name for herself and gain something financially. Flaig concluded by telling the dancers that he preferred they limit their interactions with her. (Tr. 137.)

5. Respondent calls other clubs

Campbell performed at the Club on March 12 and 13. She then travelled to West Virginia and performed at two clubs there.[17] Flaig called one of clubs to give them a "heads-up" about Campbell and that she was an "activist." He spoke to a manager and read through the bullet points from Campbell's March 12 letter. Flaig told the manager he wanted them to know what they were up against, because Respondent had been ill-prepared. (Tr. 147–148.)

At around this time, Flaig also directed Stevenson to call the Seville Club in Minneapolis, because, according to Campbell's website, that club had some success defending against certain of the allegations in her Board charges. He told Stevenson to speak to a manager without identifying where she was calling from and try to get advice on what Respondent should do in the event Campbell filed charges against the Club. As instructed, Stevenson called the Seville Club and spoke to a manager familiar with Campbell and her charges. After the call, Stevenson reported back to Flaig and Bonzo that she was told by the manager there to make sure to document everything and have "backtracking" paperwork. (Tr. 150–152).

6. Recording of dances

In mid-March, Bonzo and Flaig met to discuss how Respondent could legally terminate Campbell's lease. They discussed trying to catch her performing an illegal dance. They also discussed having one of Bonzo's friends come into the Club and be "extra handsy" with Campbell during a private dance. They discussed that if she did not push his hands away, she would be violating Ohio's no-touching law, and she would be in breach of her lease agreement. (Tr. 155.)

Campbell next performed at the Club on March 22. That day, Bonzo sat in the back office with a camcorder and videotaped the monitors showing Campbell's private dances. Respondent introduced videos of four dances with three different patrons. (R. Exh. G). In one video, Campbell appears to be straddling above the patron's leg, but it is unclear whether she touched the patron's leg with her legs. In another video, Campbell touches the patron's shoulders and arms. In the last video, Campbell puts her arms around a patron's neck and rubs or strokes his beard.[18]

7. Campbell's texts, requests lease documents, and threatens to go to the Board

Campbell did not perform at the Club between March 22 and April 3, and there was no explanation given for why. During this time, Campbell sent several incendiary text messages to Stevenson and Bonzo, accusing Tegtmeier and Bonzo of being "racists" and "white supremacists," claiming they limited how many women of color could perform at the Club. Campbell used profanity and insults in her texts. This likely was intended to provoke a hostile response. But Stevenson and Bonzo did not take the bait; they both replied with measured responses. (R Exh. A.)

On March 25, Campbell posted on her website about the New York City stripper strike, which concerned allegations that gentlemen's clubs there were discriminating against dancers/strippers based on race. (GC Exh. 16.) That same day, Campbell sent Bonzo a text stating she hoped the New York City stripper strike comes to Columbus and puts Respondent's "racist club" on the national news. (R Exh. A).

On March 28, Campbell posted on her website about lease agreements, and how clubs use them to misclassify dancers as independent contractors. (GC Exh. 16.) In her post, Campbell referred to her earlier settlement with Silk Exotic Madison when it misclassified her as "a lease holder." She added that "the NLRB took good care of me" and readers could read her earlier post about Silk Exotic by using the search function on the website. Campbell then went on to write that the clubs in Ohio use the "stripper lease bullshit en masse" and they go "to extreme lengths to exploit, abuse and use naïve dancers who don't know their labor rights . . . [and those dancers] are misclassified employees . . ."

That day, Bonzo forwarded Campbell's text about the New York City stripper strike to Flaig, stating "she is at it again."

[16] After seeing Campbell's website, and the posts about her prior Board charges, Bonzo testified that: "[W]e did not know which way it was going to go, because of all the rumors and looking at her blogs with lawsuits and NLRB [charges] and is she an employee? Is she not an employee? And it just kind of looked like a setup in a way . . ." (Tr. 640.)

[17] Campbell testified she went to West Virginia because other dancers at the Club threatened her with harm because of her March 12 letter.

[18] In two of the videos it appears Campbell is nuzzling or kissing the patron's neck, but it is unclear. During cross-examination, Campbell was asked about these portions of the video, and she explained that she inhales air, gets close to the patron, and then exhales as she moves down from the patron's head, to their neck, to their clavicle—all without actually touching the patron. (Tr. 476.)

Later that day, Bonzo sent Flaig a text that Campbell "is posting today" and accusing "clubs in Columbus of racism." (GC Exh. 24.)

Campbell next performed at the Club on April 3. That evening, after 11 p.m., Campbell sent Bonzo a series of text messages. (R Exh. A). In the first, she wrote about the lease documents stating, "Brenda I hope u dont use adhesion with those new hires—that's not very nice!" About 15 minutes later, Campbell sent a text asking for a copy of her "contract" because she did not receive one when she was hired or when she later asked Flaig for a copy. About 30 minutes later, Bonzo responded to Campbell in a text stating the 2018 contracts were being reviewed offsite and she would let Campbell know when they got them back. Campbell responded she did not believe Bonzo and asked again when she could get a copy of her contract. The following evening, April 4, Campbell sent Bonzo a text asking, "Are you going to get me a copy of my contract that is rightly mine or do I have to get the NLRB to subpoena one for me?" Seven minutes later, Campbell again texted Bonzo, asking "When can I get my contract?" (R. Exh. A). There is no evidence whether Respondent provided Campbell her requested lease documents.

On April 4–6, Campbell showed up at the Club without being scheduled to perform and was told by supervisors on two occasions that there was no space available for her to perform.[19]

8. April 7 letter

On around April 7, Flaig prepared and mailed Campbell a four-page letter terminating her lease, stating that Respondent had videotaped her performing illegal private dances at the Club "multiple times." (GC Exh. 26.) In this letter, Flaig repeatedly refers to Campbell's website and her prior Board charges, stating:

> You told people after your letter to Fred one week later that they could find "the Truth" about clubs and how to challenge the club on Dancers Stripper Labor Rights, your blog. We then found out your motives and read your web site that showed that your pattern and practice is to sue, destroy and lash out at people as I'm sure you will do to me and others when you read this letter. Please think before you act here. Your texts do not paint to you in a flattering picture with your vulgarity. Your blog, attacking people, is many times done in a spiteful and hurtful manner. You show a lot of hatred.
>
> . . .
>
> We wish our lives to go our own directions and hopefully, not cross again.
>
> I know this is doubtful, since you invested time and effort to get a lawsuit out of something here for your blog, future newspaper articles or book.
>
> . . .
>
> After you delivered your letter to Fred, you have bragged too (sic.) many about all your lawsuits that you make money from. It should not be hard for you to write about others for your books, blogs, movies, and articles.
>
> . . .
>
> Try to be more objective, more open to other people's views and try to work with owners, instead of just causing your own demise and then suing them.
>
> . . .

(GC Exh. 26).[20]

IV. ANALYSIS AND DISCUSSION

A. Witness Credibility

In assessing credibility, I primarily relied upon witness demeanor. I also have considered factors such as: the context of the testimony, the quality of the recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)). Most of my credibility findings are incorporated into the findings of fact above.

The General Counsel called as his witnesses: Stevenson, Campbell, and Flaig (for the limited purpose of authenticating certain subpoenaed documents). Respondent called as its witnesses: Bonzo, Flaig, and current employees Louis Garcia (backroom attendant), Molly Ticknor (dancer), Brittany Johnson (dancer), and Cheyenne Vaughan (dancer).

Based on my observations at hearing, I generally found Stevenson and Campbell to be credible witnesses, and I credit their testimony to the extent consistent with my findings of fact.

Stevenson had a clear and detailed recollection, and her testimony was largely straightforward, consistent, and plausible. Respondent sought to portray her as a disgruntled former employee angry at Bonzo for forcing her to resign in November for failing to repay a patron who loaned her (or her roommate) money, and/or because Bonzo terminated or forced Stevenson's boyfriend/fiancé to resign from the pool hall that Tegtmeier owned. While I do find that Stevenson appeared hostile toward Bonzo, I

[19] Stevenson was one of the supervisors who told Campbell there was no space for her to perform. Stevenson testified she had been told by management to tell this to Campbell if she showed up, even though there was room available for Campbell to perform. She also testified Bonzo asked her to help her fabricate "no-space" logs showing names, dates, and times of dancers who Respondent allegedly turned away because there was no space. Bonzo told Stevenson she wanted her to help so the handwriting on the logs would look different. (GC Exh. 11)(Tr. 139–141.)

[20] At the hearing, Bonzo confirmed the sole reason Campbell was discharged was because she engaged in illegal conduct during private dances, in violation of Ohio law. (Tr. 671; 673.)

do not find it led her to provide false testimony. On the contrary, I find any hostility Stevenson had toward Bonzo motivated her to be forthcoming about everything she knew and witnessed. Respondent also sought to impeach Stevenson with typed statements she signed about Campbell's conduct prior to her termination. These undated statements were prepared by Flaig and given to Stevenson to sign. Stevenson testified she felt coerced into signing the statements, believing she would be terminated if she did not.

While Respondent attempted to discredit Stevenson, it did little to refute the content of her testimony. Stevenson was the General Counsel's primary witness, and she testified about several critical conversations and events, particularly those that took place after Respondent learned about Campbell's website and her prior Board charges. Respondent, however, failed to fully question Bonzo about several of these matters, and it did not question Flaig at all, leaving much of Stevenson's testimony unrebutted.

Campbell also had a clear and detailed recollection, and her testimony was candid, logical, and largely corroborated by other credible evidence. However, I am troubled by the General Counsel's failure to call any of the dancers Campbell spoke to regarding the conditions at the Club before she submitted her March 12 letter. The absence of corroboration on this point undermines the strength of Campbell's testimony about those conversations. Additionally, I do not credit Campbell's testimony that she went to West Virginia because other dancers were threatening her. I find that if dancers had threatened her, she would have reported it when it occurred. But, overall, I found the remainder of her testimony to be credible.

Based on my observations at hearing, I did not find Respondent's witnesses to be credible. Ticknor, Johnson, and Vaughan each continue to work at the Club and rely upon Respondent for their incomes. Additionally, they report to Bonzo, who remained in the hearing room during their testimony. I find they "volunteered" to testify on Respondent's behalf, and tailored their testimony to support Respondent's defenses, because they believed Campbell's charge poses a threat to their continued entertainer tenant status and, concomitantly, their continued ability to make a living. Finally, I do not credit their testimony about the policy against touching patrons because the testimony was largely in response to leading questions from Respondent's counsel during direct examination. (Tr. 514–515; 535–537; 557–558.)

Much of the same holds true for Garcia. He continues to work for Respondent as is his sole source of income. He also reports to Bonzo, who remained in the hearing room throughout his testimony. Setting that aside, I found the content of his testimony to be unreliable. He testified that he twice saw Campbell "touching" patrons during her private dances. The first time he approached her "about doing things illegally" and she told him he was not her boss. The second time he just reported it to management. (Tr. 575–578.) He could not recall when either of these instances occurred.[21] In June, following Campbell's termination and the filing of the original unfair labor practice charge in this case, Flaig prepared a typed statement for Garcia to sign regarding these instances. Respondent introduced this statement into evidence. (R Exh. B). Garcia testified the types statement was based on a handwritten statement that he made, but he could not remember when or why he wrote that statement. He also did not keep or receive a copy of his handwritten statement, and one was never introduced into evidence. Moreover, when Garcia testified about these instances involving Campbell, he did not appear to be testifying based upon his independent recollection; rather, he repeatedly looked to the typed statement Flaig prepared for him, which Respondent's counsel gave to him at the start of his direct examination.

I also do not credit Garcia's testimony regarding his practice when he sees dancers touching a patron. He testified as follows on cross-examination:

> Q. And what's your understanding of the no touching rule?
>
> A. My understanding is it's pretty self-explanatory. There's no touching.
>
> Q. No touching anywhere?
>
> A. Yes.
>
> Q. Okay. But you saw dancers touching customers and vice versa every day, right?
>
> A. Not every day.
>
> Q. Just about every day?
>
> A. No. Any time an incident would come up, I would notify the managers and they would handle the situation.

(Tr. 585.)

Garcia, however, failed to testify about any other instance(s) in which he notified managers about another dancer touching a patron. And, as discussed below, Respondent introduced no credible evidence of any other dancer being disciplined or discharged for touching a patron. The absence of such evidence undermines Garcia's testimony because if he reported it, and Respondent consistently disciplined or discharged others for such conduct, it is reasonable to expect that Respondent would have offered that into evidence.

Finally, Garcia appeared hostile to Campbell, stating that he did not believe she actually was trying to organize a union or help the other dancers at the Club or at any of prior clubs where she performed. He referred to it all as "a bunch of B.S." (Tr. 584.)

I also do not credit Bonzo's testimony. Her responses were self-serving, contradictory, unsupported, and undermined by the credible evidence. One example concerns her testimony as to whether dancers have the choice to be employees or entertainer tenants when they start performing at the Club. Initially, during direct examination, Bonzo confirmed the dancers were given this choice. (Tr. 609–610.) But, during cross-examination, she contradicted herself and said there was no choice and that all dancers had to be entertainer tenants. (Tr. 691–692.) Not only did Bonzo contradict herself, but she contradicted Ticknor, Johnson, and Vaughan who each testified, in Bonzo's presence, before Bonzo was called to testify, that they were given the choice of whether to be an employee or an entertainer tenant. Moreover,

[21] Bonzo testified Garcia reported to her that Campbell was touching patrons during private dances in February, shortly after she began performing at the Club. (Tr. 630–631.) Bonzo, however, did not document this complaint. (Tr. 715.)

Respondent concedes in its post-hearing brief that dancers are given this choice. (R. Br. 18.)

A second example concerns Bonzo's characterizations of the amount(s) dancers are charged if they arrive after the start of their scheduled lease time. She insisted dancers are not fined, and they can arrive whenever they want. She testified that if dancers chose to come in late, their "rental fee" increases based on when they arrive. (Tr. 736–737; 745.) Setting aside the strained logic of having alleged independent contractors pay more to be at the Club less, there is no support for Bonzo's testimony. None of the other witnesses, including the other dancers, testified to having to pay higher rent if they arrived late; instead, they confirmed dancers paid a flat amount of $14 in rent each day/night they performed. Additionally, Respondent's own documents refer to the amounts it charges dancers for arriving after their scheduled start time as "late fee[s]" and those amounts are tallied and labelled as "damages." (GC Exh. 27) (Tr. 736–738.) There is basis for referring to higher rent amounts as damages.

A third example concerns Bonzo's shifting responses regarding the importance of having dancers. She repeatedly referred to Respondent's "business model" and how it was important to Respondent's business model to have entertainers performing at the Club, and that was why they had stages and why they expected the dancers to be there to perform. (Tr. 703–704.) But then minutes later, she testified Respondent did not need entertainers, and only a small percentage of the Club's revenues come from private dances. (Tr. 705.) Then, later, when asked about whether Respondent would have any issue with dancers leaving early, she again testified Respondent's business model was to have dancers, and if they all left at 8 p.m., there would be no point to having the business model. (Tr. 777). Then, minutes later, when she was reminded that Respondent is a "sexually-oriented business," Bonzo testified, "That's just a label … We don't need entertainers to survive." (Tr. 781–782.)

Finally, I found Flaig was not credible both for what he said and what he did not say. The General Counsel called him during its case-in-chief to authenticate documents containing text messages, specifically asking him about whether it was his handwriting on the documents and whether had he sent/received the texts; he was evasive in responding to these questions. After a protracted examination on this topic, Respondent's counsel stipulated it was, in fact, Flaig's handwriting on the documents. Flaig, however, remained unwilling to confirm he sent or received the particular text messages, even though they had a notation, in his handwriting, stating, "Brenda sent to me." (Tr. 501–504.)

Flaig was not questioned about several critical events and conversations testified to by Stevenson, including: his statements to employees about Campbell during the mandatory meetings; his conversations with Bonzo about finding ways to terminate Campbell's lease; his call to the West Virginia club to warn them about Campbell; his instruction to Stevenson to call the Seville Club to get advice on how to defend against a Board charge; the discussions he had with Bonzo about setting Campbell up by having a friend pose as a customer and try to get her to perform an illegal dance; and the instruction to supervisors to no-space Campbell until Respondent could find a way to terminate her lease. When a witness is not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc*., 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc*., 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). I, therefore, take an adverse inference that if Flaig had been questioned about these matters he would have corroborated Stevenson's testimony.[22]

With these determinations in mind, I now consider the issues of whether Campbell was a statutory employee and whether Respondent discharged her because she engaged in statutorily protected activities.

B. Whether Campbell was a Statutory Employee or an Independent Contractor.

1. Legal framework

The threshold issue is whether Campbell was a statutory employee entitled to the Act's protections. Section 2(3) of the Act defines "employee" as "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . but shall not include . . . any individual having the status of an independent contractor . . ." The party asserting independent-contractor status bears the burden of proof. *BKN, Inc*., 333 NLRB 143, 144 (2001). In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the U.S. Supreme Court held the common-law agency principles are used to determine whether an individual is an employee or an independent contractor under the Act. The Board and courts apply the following factors from the Restatement (Second) of Agency §220 to determine whether the party arguing independent-contractor status has met its burden: (1) the extent of control over the details, means, and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required; (5) who supplies the tools and place of work; (6) the length of time for which the person is employed/contracted; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an employment or contract relationship; and (10) whether the principal is in the same business. There is no "shorthand formula" and "all the incidents of the relationship must be

[22] A few days prior to the hearing, Stevenson contacted Flaig because she had received a subpoena from the General Counsel to testify, and Stevenson asked Flaig what it was about. Flaig told her she could "pretend to be out of town" so she did not have to testify. He stated he spoke with five lawyers who confirmed that because it was an administrative subpoena there would be no legal consequences if she did not appear. Additionally, at the end of the conversation, Flaig told Stevenson that when she returned (from a planned trip), Bonzo had a birthday present for her. During its case-in-chief, Respondent failed to question Flaig about either of these statements, again leaving Stevenson's testimony unrebutted. There was no motion to amend the complaint to allege these statements by an agent of Respondent to a subpoenaed witness violated the Act; therefore, I need not consider the matter further.

assessed and weighed with no one factor being decisive." 390 U.S. at 258.

In *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), the D.C. Circuit Court of Appeals considered on appeal the Board's decision about whether parcel delivery drivers were employees or independent contractors. The Court observed that while the considerations at common-law agency principles remained in play, there also is the consideration of "whether the position presents the opportunities and risks inherent in entrepreneurialism." Id. at 497. This is commonly referred to as entrepreneurial opportunity.

Five years later, in *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), the Board declined to adopt the D.C. Circuit's treatment of entrepreneurial opportunity, instead holding that it would give weight to actual, not merely theoretical, entrepreneurial opportunity, and evaluate the constraints imposed on an individual's ability to pursue that opportunity. The Board also held that it would evaluate—in the context of weighing all relevant common-law factors—whether the putative independent contractor is, in fact, rendering services as part of an independent business. Id. at 621.

However, earlier this year, in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019), the Board overruled its 2014 decision in *FedEx Home Delivery*, finding the majority in that case greatly diminished the significance of entrepreneurial opportunity and selectively overemphasized economic dependency. Id. slip op. at 7. The Board in *SuperShuttle DFW, Inc*. held:

> [E]ntrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa.

Id. slip op. at 9.

The Board further held that where a qualitative evaluation of the common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the individual is likely to be an independent contractor. Id. slip op. at 11.

In *SuperShuttle DFW*, the issue was whether franchisees operating ride-share vans at the Dallas-Fort Worth and Love Field Airports were statutory employees. The Board held the evidence regarding the extent of control (or lack thereof) by the company, the method of compensation, the ownership of principal instrumentality and investment, and the lack of supervision demonstrate that the franchisees have significant opportunity for economic gain and significant risk of loss, which strongly supported finding independent-contractor status, and outweighed by any countervailing factors supporting employee status.

As for control, the Board found that franchisees had total autonomy to decide when, where, and how long they worked—they merely had to turn on their ride-share device and wait for the next bid to be announced. Once a trip was offered, they could weigh the cost (i.e., time spent, gas, tolls, etc.) against the fare and decide whether to accept it. If they wanted to take a break or end their day, they simply turned off their device. The company could assess was a $50 fine if the franchisee accepted a ride and failed to perform it. Although the franchisees were subject to various requirements concerning appearance, seating, decals, and inspections, those requirements were imposed by the state-run airport, not the company. Id. at slip op. at 13 citing to *Don Bass Trucking Co*., 275 NLRB 1172, 1174 (1985) ("government regulations constitute supervision not by the employer by the state."). Also, while the company set the fares the franchisees could charge, required them to accept company vouchers and coupons, and imposed additional inspection and training requirements, the Board found that evidence was outweighed by the franchisees' freedom to control their day-to-day working conditions, including scheduling and selecting bids. Id. slip op. at 12–13.

As for method of compensation, the Board found the franchisees were paid solely based on the rides they performed. They were responsible for paying the company a monthly flat fee pursuant to their franchise agreement, and the fee did not vary based on revenues earned; otherwise, they were entitled to all fares collected from customers, and they did not share them in any way with the company. The lack of any relationship between the company's compensation and the amount of fares the franchisee collected supported that the franchisees were independent contractors. Id. slip op. at 13.

As for instrumentalities, tools, and place of business, the Board found the franchisees were required to make significant investments into their businesses, including purchasing or leasing a van (which cost around $30,000 or more), paying the franchise fee, and paying a weekly flat fee to use the company's ride-share device and system. Also, the Board found franchisees were solely responsible for all costs associated with operating their vans (i.e., gas, tolls, repairs, maintenance, and insurance). Id. slip op. at 13.

As for supervision, the Board found the company had little day-to-day supervision over the franchisees. The only daily communication between the company and the franchisees was through the dispatch system. But because the franchisees had the right to accept or decline any bid, the company did not "assign" routes to franchisees or perform any other supervisory role. The Board also found the franchisees' "near-absolute autonomy" in performing their daily work without supervision outweighed the company's "few and minor isolated fines." Id.

As for the intent of the parties, the Board concluded the parties did not intend their relationship to be one of employer-employee. In reaching this conclusion, the Board focused on the franchise agreement and its repeated references to the franchisees as being independent contractors, not employees, along with the fact that franchisees did not receive any promised compensation or benefits from the company, and the company did not withhold taxes or make any payroll deductions. Id. slip op. at 14.

2. Application of the common-law agency principles

As stated, Respondent bears the burden of establishing Campbell's independent-contractor status. Respondent argues the facts are analogous to those in *SuperShuttle DFW,* and the same result should be reached in this case regarding her independent-contractor status. As explained below, I reject those arguments and find Respondent has failed to meet its burden.

a. The extent of control over the details, means, and manner of the work

The first factor is the extent of control Respondent may exercise over the details of the dancers' work. Respondent argues it exerts little control over the dancers, and they are free to choose their work schedules, clothing and footwear (subject to Ohio law), music (within the classic rock genre), and the number of private dances (if any) they perform and for whom, as well as how they perform those dances.

As previously discussed, I find Respondent requires its dancers abide by several rules and expectations affecting their work. It begins with the hiring process, where the dancer must apply and audition in front of a manager. The manager must decide that the dancer is a good fit before she will be allowed to perform at the Club. If the dancer elects to be an entertainer tenant, Respondent provides her with the lease documents which contain the rules and regulations the dancers must follow. As stated, these documents, along with the unwritten rules and expectations previously mentioned, largely dictate the dancer's day-to-day work, including, but not limited to, scheduling, clothing, footwear, stage rotations, performances, private dance pricing, Up-time, drink commissions, prohibited conduct, and the entertainer-tenant guarantee.[23] If a dancer fails to abide by these rules and expectations, Respondent may assess fees or fines. If the conduct is more egregious, it may suspend ("no-space") or ban the dancer from performing at the Club.

Respondent argues the dancers have the same control over their work as the franchisees in *SuperShuttle DFW*. As stated, the Board in that case found the franchisees had total autonomy to decide whether, when, where, and how long they worked—they merely turned on their ride-share device and waited for the next bid to be announced, chose what bid(s) they wanted to accept, and when they wanted to take a break or end their day, they simply turned off their device. That is not the case here. According to the lease agreement, if dancers want to lease space, they must notify Respondent a week in advance with the dates and times they want to perform. If they fail to provide this notice, they still may be able to lease space, but only if Respondent determines that space is available. To cancel leased space, the dancers must notify Respondent at least a day in advance. Additionally, if the dancers lease space, they must arrive before their scheduled start time, perform for a minimum of 4 consecutive hours, and remain until the end of their scheduled time, otherwise, Respondent will assess them fees or fines.

Respondent argues its ability to assess fines/fees should not affect the dancers' independent-contractor status because in *SuperShuttle DFW* the company could fine franchisees $50 fine if they failed to complete a scheduled pick-up. This is an oversimplification of the Board's holding. On this issue, the Board held the company's ability to assess "few and minor isolated fines" did not outweigh the franchisees' "near-absolute autonomy" in performing their daily work without supervision. Again, that is not the case here. Respondent's fees and fines were not few, minor, or isolated. From late February through mid-to-late March, Respondent issued "late fees" of $5-$25 to dancers on an almost daily basis. (GC Exh. 27). Plus, there are the undocumented fees or fines if dancers leave early or fail to abide by the other rules regarding their conduct. Nor can it be said that the dancers at the Club have "near-absolute autonomy" in their daily work. As explained, dancers must follow rules and expectations governing their day-to-day work, and the managers and supervisors are consistently monitoring and ensuring their compliance. Moreover, the $50 fine the franchisees had to pay went to the driver who performed the trip, not the company. Here, the dancer pays the fee to Respondent, because, according to Respondent, its business *could be* harmed when the dancer fails to appear as scheduled. (R. Br. 15). But there is no evidence Respondent determines whether there has been actual harm before it assesses these fees/fines. Additionally, the only loss of expected income Respondent experiences if dancers fail to show up to perform is the rental fee they pay to lease space.

Respondent also argues that like *SuperShuttle DFW*, it imposes requirements on dancers that are mandated by Ohio law, which cannot be relied upon as evidence of employer control. While certain of Respondent's requirements are mandated by Ohio law, most are not. For example, the "conditions of space lease usage" portion of the lease documents contains several requirements having no relation to any law, including that dancers must arrive at the Club with enough time to be ready for their start time, check in with the DJ when ready to begin, never miss their turn on stage, entertain while on stage, immediately go to the dressing room when called, participate in all stage shows (i.e., Up-time), and pay all rents and fees, and have the manager's approval, before leaving the premises. The same is true of certain rules and expectations dancers must follow while performing on stage, including that they must remain on stage and not go out into the seating area, they must perform for two songs and must remove their top within the first minute of the first song, and the songs they perform to must be of the classic rock or rock genre. Finally, this also holds true for many of the unwritten rules or expectations dancers must follow when they are not performing on stage, including the requirements that: dancers must sign up to take smoking breaks, and only two are allowed on break at the same time; dancers may not loiter in the dressing room and are expected to be out mingling on the floor; if a patron purchases a dancer a drink, the dancer is expected to sit and converse with the patron while consuming the drink; dancers must get permission before using the public restrooms; and dancers may not accompany a patron to the ATM.

Also, like the company in *SuperShuttle DFW,* Respondent sets the (minimum) prices for private dances and Up-time promotions, and it establishes the rents and fees dancers must pay to lease space and use the back rooms for private dances. However, as part of the rent, Respondent requires that dancers pay $2 to purchase the Club's "nipple tape" and pay $2 in "legal fees" to the organization employing Flaig. Again, the purpose of these

[23] Bonzo testified that Respondent does not enforce certain provisions in the lease documents (e.g., breathalyzer test, assistance fees, cancellation fees, etc.). Regardless, the standard is whether the employer *may* exercise control over the employee's day-to-day work, and the lease documents give Respondent that authority. Even if a fine or penalty is not assessed, I find the authority or written threat to impose such fines or penalties is indicative of control.

legal fees was not explained, but it is indicative of control. Additionally, Respondent does not allow the dancers to handle the transactions with the customers for private dances; it requires that those transactions be done through, and recorded by, the back-room attendant.

In addition to controlling the dancers' day-to-day activities, Respondent controls their work environment and customer base. It controls the hours of operation, the maintenance of the building, the aesthetics and decor, the sound system and music, and the inventory and pricing of food and beverages. It controls the customers coming into the Club through advertising, promotions, and determining and enforcing the cover charge. Finally, it is responsible for hiring and employing the bartenders, servers, DJs, security, and other staff—all of whom the dancers rely upon to earn their income.

Based on the evidence, I find Respondent exercises significant control over the dancers' day-to-day work. Overall, I find this factor favors employee status.

a. Distinct occupation or business

The second factor is whether the dancers are engaged in a distinct occupation or business. This involves determining, in part, whether the individual is integrated into the employer's operations, or if the individual's services are engaged temporarily to accomplish tasks incidental to the employer's regular business. Restatement (Second) of Agency § 220(2) cmt. I (observing that if the occupation, even a highly skilled one, is considered part of the regular business of the employer, there is an inference the individual is a servant). Respondent does not address this factor in its brief.

The dancers rely on Respondent to earn a livelihood through seminude dancing in a club atmosphere; they are not retained by Respondent to exercise care and skill in accomplishing a specific result. There is no evidence that any of the dancers operate as independent businesses or formed corporate entities for tax, accounting, liability, or other purposes. Also, the dancers may not subcontract their lease or have another dancer come in and work for them. Although the lease agreement allows it, there is no evidence that dancers individually advertise or engage in promotional marketing. As previously stated, the dancers are largely, if not entirely, reliant on Respondent for customers when they are performing at the Club. While the dancers can, and some do, work outside of their relationship with Respondent, that does not establish that they are a distinct business, as they would be equally reliant on that other club(s) in the same way they are on Respondent.

Based upon the evidence, I find the dancers do not constitute a distinct occupation or business within the meaning of the Restatement. Overall, I find this factor favors employee status.

c. Kind of occupation

The third factor is the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. There is no evidence in the record how the work of a dancer/stripper is done anywhere other than at the Club. Respondent argues there is little-to-no supervision; dancers are expected to appear when they lease space and abide by Ohio law while on the premises.

As previously discussed, I find that Respondent's managers and supervisors monitor the dancers' day-to-day work and compliance with Respondent's written and unwritten rules and expectations. They counsel and, if necessary, discipline the dancers, through verbal warnings, fines/fees, and suspensions. And while there is some skill involved in dancing, there is no basis to conclude that the dancers are specialists.

Based upon the evidence, I find dancing/stripping is not a specialty occupation, but rather one customarily viewed in the employer-employee context.

d. Skill

The fourth factor is the level of skill required for the occupation at issue. Respondent does not address this factor in its brief.

Respondent does not require that dancers have any prior experience or training to perform at the Club. During the audition, the manager is looking at the dancer's appearance and whether she can walk in heels. There also is no evidence that Respondent provides training to its dancers, beyond a manager briefly demonstrating how to perform a dance before the audition. This is not to say all dancers lack training, experience, or artistic skill; only that it is not a prerequisite to getting or holding the position. Similarly, a dancer likely would benefit by having strong interpersonal and salesperson skills, but they also are not prerequisites to getting the position. The level of entrepreneurial skill to get patrons to want to purchase private dances is similar to that required to be a waiter, bartender, or commission-based salesperson—which are all generally considered to be employees, not independent contractors.

Based on these factors, I find the limited skill necessary to be a dancer favors employee status.

e. Ownership of instrumentalities, tools, and place of work

The fifth factor concerns which party supplies the instrumentalities, tools and the place of work. Respondent does not address this factor in its brief.

The dancers are responsible for providing their outfits, footwear, cosmetics, and hair products; Respondent provides everything else, including the building, furniture, lighting, sound system, stages, music, food, alcohol and other beverages, permits, security, DJs, bartenders, servers and other staff. Unlike in *SuperShuttle DFW*, where the franchisees made significant initial investment, including paying the franchise fee and acquiring a van, and then continued to make ongoing investments to maintain and operate the van, the dancers' investment is minimal. Aside from their outfits, footwear, and hair and make-up, the only other cost is the $14 rental fee they pay each day/night they lease space. The dancer's economic risk associated with paying this rent is readily offset by their opportunity to collect performance fees, cash tips, and drink commissions, and it is vastly less than the risk that Respondent undertakes by operating the Club. Moreover, if the dancers comply with the rules, Respondent guarantees they will earn a minimum of $100 a shift, which effectively negates any risk the dancers would have.

Based on these factors, I find the ownership of instrumentalities, tools, and place of work favors employee status.

f. Length of employment

The sixth factor is the length of time the person is engaged or performing work. The more permanent or longer lasting the relationship, the more likely the person will be found to be an employee. Respondent argues the dancers sign a lease with a maximum term of one year, and there is no evidence whether dancers renew their leases.

Although the lease is for one year, it automatically renews unless terminated by either party. There are dancers who leave before the end of the year, but there also are dancers who continue to perform beyond a year. At the hearing, Respondent called three dancers to testify as part of its case-in-chief. Those three dancers have been working at the Club as entertainer tenants for between 1.5 and 4 years. Respondent also has another dancer who has performed, on and off, for over 20 years. (Tr. 271.)

Additionally, the dancers' apparent ability to work at other clubs does not suggest that the working relationship is impermanent. Their ability to work elsewhere, or in other lines of work, does not materially distinguish them from countless other workers, particularly those in the service sector, who perform the same work for multiple employers in order to make a living.

Based on these factors, I find the length of employment of the dancers at the Club favors employee status.

g. Method of payment

The seventh factor is the method of payment. Respondent argues that like *SuperShuttle DFW,* the Club sets the minimum prices and fees, but the dancers' earnings are directly tied to how often and how much they choose to work.

In *SuperShuttle DFW*, the Board found the lack of any relationship between the company's compensation and the amount of fares the franchisees collected to be a significant factor in concluding they were independent contractors. Here, the dancers pay Respondent a fee/split for *each* private dance they perform, and the amount varies depending on the day, time, and length of the dance. The more dances a dancer performs the more money she makes, but also the more money Respondent makes. Unlike in *SuperShuttle DFW*, there *is* a clear relationship between Respondent's compensation and the number and type of dances the dancers perform, which is presumably why Respondent wants dancers to arrive on time, remain for their entire shift, not loiter in the dressing room, and not sit down during Up-time.

Another key distinction is that Respondent "guarantees" the dancers will receive a minimum compensation of $100 per shift, regardless of whether they sell any dances or drinks. Respondent has cited to no other cases, and I have found none, in which an individual who is promised a minimum compensation by the employer is deemed to be an independent contractor.

Based on these factors, I find the method of compensation, particularly the entertainer-tenant guarantee, favors employee status.

h. Regular part of the business

The eighth factor is whether the work at issue is a regular part of the employer's business. Respondent does not address this factor in its brief.

Respondent refers to itself as a "gentlemen's club." (Tr. 22, 34.) By definition, a "gentleman's club" is "a nightclub for men that features scantily clad women dancers or stripteasers." *Merriam-Webster Online Dictionary* (www.merriam-webster.com/dictionary—retrieved on June 9, 2019). As stated, Bonzo gave conflicting responses regarding the importance of dancers to Respondent's "business model," and she did so more than once. Initially, she described dancers as being part of Respondent's business model, and that there would be no reason to have stages if they did not have dancers, and there would be little reason to have dancers if they did not perform. She later stated Respondent did not need dancers, and that people come to the Club to watch television, drink, and talk to the bartenders. She testified that only 20 percent of Respondent's income comes from the fees it collects from dancers, and that 60 percent comes from the sale of alcohol. The two need not be mutually exclusive: patrons may come to gentlemen's clubs to watch the dancers on stage *and* consume alcohol while doing so. Furthermore, Respondent's alcohol sales include those patrons purchase for dancers.

Based on the foregoing, it is illogical to conclude that dancers/strippers are not integral to the success of a club that refers to itself, and markets itself, as a gentlemen's club. Overall, this strongly supports the finding of an employee-employer relationship.

i. Belief of the parties

The ninth factor is the parties' belief regarding the type of relationship they have. Respondent contends that dancers are given the choice to elect to be entertainer tenants, and that they knowingly and willingly enter into that relationship.

Based on the evidence, and numerous documents the dancers sign confirming they are electing to be entertainer tenants that lease space at the Club, I find this factor supports finding independent contractor status.

j. Principal's business

The principal in this case is Respondent and, as stated, Respondent is in business of operating a gentlemen's club with topless female dancers. The dancers "are" the business. Contrary to Respondent's claims, I find topless dancers are the main attraction at a gentlemen's club and obviously important to Respondent's business and revenues.

Based on this evidence, I find this factor favors finding employee status.

k. Weighing these factors

In evaluating these factors, both in quantity and quality, I find the evidence overwhelmingly establishes the dancers are employees rather than independent contractors. Unlike in *SuperShuttle DFW*, Respondent exercises significant control over the dancers' day-to-day work, their work environment, and their customer base, which, in turn, results in a high degree of control over the dancers' opportunities for gain. Respondent also supervises the dancers and regularly penalizes them for failing to comply with the rules. Also, unlike in *SuperShuttle DFW*, the dancers make minimal investment and have minimal risk—their investment is their rent and the cost of their make-up, hair, outfits, and footwear. And if they comply with Respondent's rules, they are guaranteed to be paid at least $100 a shift. Also, Respondent's compensation is tied to the dancers' performances; the

more the dancers earn in drink commissions and dance fees, the more Respondent earns. Overall, under the current standard, I find Respondent has failed to meet its burden.

A. Whether Respondent discharged Campbell in violation of Section 8(a)(4) and (1) of the Act because she previously filed unfair labor practice charges against other employers and threatened to file a charge against Respondent

An employer violates Section 8(a)(4) of the Act when it discharges or otherwise discriminates against an employee for filing (or threatening to file) charges or giving testimony under the Act. See *First National Bank & Trust Co*., 209 NLRB 95 (1974). To determine whether the employee's discharge violates Section 8(a)(4), the Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See *Verizon*, 350 NLRB 542, 546–547 (2007); *American Gardens Mgmt. Co*., 338 NLRB 644, 644–645 (2002); and *McKessen Drug Co*., 337 NLRB 935, 936 (2002). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's statutorily protected conduct was a motivating factor for the employer's decision to discharge the employee. The General Counsel satisfies the initial burden by showing: (1) the employee engaged in, or was believed by the employer to have engaged in, statutorily protected activity; (2) the employer had knowledge of that activity; and (3) the employer had animus. See *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 (2018); and *Alternative Energy Applications Inc*., 361 NLRB 1203, 1205 (2014). Unlawful employer motivation may be established by circumstantial evidence, including among other things: the timing of the termination in relationship to the employee's protected activity; the presence of other unfair labor practices; statements and actions showing the employer's general and specific animus; the disparate treatment of the discriminatee; departure from past practice; and evidence that an employer's proffered explanation for the termination is a pretext. See *Kitsap Tenant Support Services, Inc*., 366 NLRB No. 98, slip op. at 11 (2018), citing *National Dance Institute--New Mexico, Inc*., 364 NLRB No. 35, slip op. at 10 (2016).

If a prima facie case is established, the burden then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's statutorily protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curium). The employer cannot meet its burden merely by showing that it had a legitimate reason for the discharge; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co*., 357 NLRB 1084, 1086 (2011); *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996). When there is strong evidence of a discriminatory motivation, the employer bears a substantial defensive burden. *East End Bus Lines, Inc*., 366 NLRB No. 180, slip op. at 2 (2018).

In applying the *Wright Line* factors, I find the General Counsel has demonstrated that Campbell's statutorily protected Board activities were a motivating factor in Respondent's decision to discharge her. Campbell engaged in protected Board activity when she filed and pursued charges against her prior employers for, among other alleged violations, discrimination and misclassification. Respondent was aware of Campbell's prior Board charges, and their outcomes, from reviewing her website and the online newspaper articles. Campbell also engaged in protected Board activity when she sent Bonzo the April 4 text message threatening to go to the Board if Respondent did not provide her with a copy of her requested lease documents.[24]

There is ample evidence of employer animus. When Respondent's supervisors and agents became of aware of Campbell's website and her prior Board charges, they expressed concern that she was planning to do the same with Respondent, and that she was attempting to set them up. Flaig, in the presence of Bonzo and Tegtmeier, told the other dancers during the mandatory meetings that he did not know what Campbell was attempting to accomplish (with her letter), but she appeared to be a fan of class action lawsuits, and he believed she was trying to make a name for herself and gain something financially by suing the clubs where she worked. He concluded by telling the dancers he preferred they not interact with Campbell. After this, Stevenson and Bonzo began monitoring Campbell's interactions with other dancers and breaking up those conversations.

Further evidence of animus exists with Flaig's call to the West Virginia club where Campbell went to work after she submitted her March 12 letter, warning the club that the Campbell was an "activist" and that Respondent had been "ill-prepared" to handle her.

Also, in the event Campbell filed charges against Respondent, Flaig had Stevenson call the Seville Club for advice because, according to Campbell's website, it was one of clubs that had some success defending against her charges. And the advice she received was to make sure to document everything and have "backtracking" paperwork, which Respondent heeded, going so far as to fabricate documents, such as the no-space logs.

Also, as discussed, Flaig and Bonzo discussed setting Campbell up by having a friend pose as a customer and try to get Campbell to perform an illegal dance, so Respondent could terminate her lease.

As stated, Respondent argues it terminated Campbell's lease because she violated Ohio's no-touching law while performing private dances at the Club. It further contends that it decided to record her dances after allegedly receiving reports from unidentified sources that Campbell was touching patrons while performing dances. The March 22 recordings show Campbell touched patrons' arms and shoulders, and she touched one

[24] Respondent argues Campbell came to the Club with an agenda to submit a prepared letter raising "canned" issues, wait for the employer to discipline or discharge her, and then file Board charges---the same pattern she followed at the prior clubs. While Respondent may be correct regarding Campbell's agenda, the Supreme Court in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), recognized that employees may legitimately have a dual purpose or objective of working and engaging in statutorily protected activities. Campbell performed at the Club while also talking with other dancers and raising issues about their shared working conditions.

patron's beard. But Respondent did not terminate her lease at that time. It was only after she sent the April 4 text to Bonzo threatening to go to the Board if she did not receive a copy of her requested lease documents that Respondent issued the letter terminating her lease.[25] This timing is further evidence of animus.

As its defense, Respondent contends that even if Campbell was engaged in statutorily protected activities, it still would have terminated her lease for violating Ohio's no-touching law. As stated, Respondent cannot meet its burden merely by showing that it had a legitimate reason for the discharge; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. Considering the significant amount of animus evidence that exists, I find Respondent bears a substantial defensive burden.

Based on my review of the evidence, I find Respondent falls well short of meeting its burden. It attempted, but failed, to establish through Stevenson that it had discharged other dancers for illegal touching/dancing. During cross-examination, Respondent's counsel listed several individuals by name, stated they had been no-spaced or had their lease terminated by Respondent for illegal touching/dancing, and then asked Stevenson whether she was aware that had occurred. Several of the individuals worked at the Club prior to Stevenson's employment, and Stevenson testified she did not know why they stopped working at the Club. There were others whose names Stevenson did not know or recognize and, therefore, could not confirm or deny that they stopped working because of illegal touching/dancing. For the remaining individuals, Stevenson testified they were no-spaced or had their leases terminated for other, unrelated reasons, not for illegal touching/dancing.

In its post-hearing brief, Respondent argues these individuals were all no-spaced or had their leases terminated for illegal touching/dancing, and Stevenson's inability to deny that to be true is the same as establishing it to be true. I reject this argument. Respondent never established through a witness, documents, or other evidence that any of these individuals Respondent's counsel named while questioning Stevenson were, in fact, no-spaced or had their leases terminated for illegal touching/dancing. Stevenson's inability to deny or refute Respondent's unproven *claims* is not the same as proving the claims. While the failure to deny or refute an established fact or supported claim may be relied upon as proof of the fact or claim, the failure to deny or refute something for which there is no evidence or support is not.

The entirety of Respondent's evidence on this topic was the through Bonzo during her direct examination, in which she testified as follows:

> Q. So assistant managers could potentially know that leases were terminated, right, but they would have no idea why, right?
>
> A Not necessarily.
>
> Q. Well, they would not necessarily what?
>
> A. Unless they were in the office at the time of a conversation or something, but we don't just sit and talk about this or that, because this person is no longer here, so if they try to come in, you know, or we just let them know.
>
> Q. So Ms. Stevenson testified that she never heard anything about any dancer leases being terminated because of illegal touching. Did you hear that testimony yesterday?
>
> A. Yes.
>
> Q. And were there dancer leases besides Ms. Campbell terminated for illegal touching?
>
> A. Yes.
>
> Q. Okay. And would Ms. Stevenson have reason to even know that?
>
> A. No.

(Tr. 602).

Without more, this conclusory testimony that other dancers were terminated for "illegal touching" does not satisfy Respondent's burden, particularly considering all the evidence of animus that exists in this case. Furthermore, even if Respondent had affirmatively established that it had terminated other dancers for illegal touching, the term "illegal touching" is unclear, because, as stated, Ohio has different statutes and regulations that prohibit different types of touching. Stating that they were discharged for illegal touching fails to distinguish between whether they engaged in "sexual touching" or "sexual activity" or merely touched a patron or their clothing in a non-specified anatomical area while performing a private dance. Without any detailed evidence, there is no basis to conclude that it, in fact, discharged others for the same sort of touching Campbell engaged in during the dances she performed on March 22.

Based on the foregoing, I find Respondent has failed to meet its burden of establishing that it would have disciplined or discharged Campbell for touching a patron, regardless of her statutorily protected activities.

Overall, I find Respondent terminated Campbell because she engaged in statutorily protected Board activities, including previously filing Board charges against her prior employers and threatening to go to the Board over Respondent's failure to provide her with her requested lease documents, in violation of Section 8(a)(4) of the Act.

Conduct found to be a violation of Section 8(a)(4) would also discourage employees' in the exercise of their Section 7 rights, and thus, is also a derivative violation of Section 8(a)(1) of the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed.Appx. 6 (D.C. Cir. 2007).[26]

[25] Respondent contends the delay was because Flaig was consulting with investigators and lawyers to determine if Respondent had grounds to lawfully terminate Campbell based on the evidence on the videos. However, Flaig was the only one allegedly involved in those discussions, and he failed to testify about those alleged efforts. I, therefore, reject those efforts were the reason for the delay.

[26] In light of my findings, it is unnecessary for me to consider and decide the allegation that Respondent also violated Section 8(a)(1) of Act when it terminated Campbell because she engaged in, or Respondent believed she engaged in, protected concerted activities when she submitted her March 12 letter. Such a finding would have no material effect on the remedy, which would similarly include a make-whole remedy, a cease and desist order, expungement, and a notice posting. See generally,

CONCLUSIONS OF LAW

1. Respondent, Nolan Enterprises, Inc. d/b/a Centerfold Club, is an employer engaged in commerce out of its Columbus, Ohio facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act by discharging Brandi Campbell because she filed or threatened to file charges or gave testimony under the Act.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(2) and 2(7) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(4) and (1) of the Act, I recommend an order requiring that it offer her full reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Campbell for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, Respondent shall be required to compensate Campbell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, Respondent shall be ordered to rescind and remove from its files any reference to the termination of her lease agreement, and to notify her in writing that this has been done and that none of these adverse actions will be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they filed or threatened to file charges or have given testimony under the Act;

(b) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Brandi Campbell full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make whole Brandi Campbell for any loss of earnings and other benefits suffered as a result of her unlawful discharge, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this Decision.

(c) Compensate Brandi Campbell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Brandi Campbell, and within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 5, 2018.

(g) Within 21 days after service by the Region, file with the

Taylor Motors, Inc., 366 NLRB No. 69 slip op. 1 at fn. 5 (2018); *Kingsbury, Inc*., 355 NLRB 1195, 1195 fn. 1 (2010).

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 25, 2019.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;

Choose a representative to bargain with us on your behalf;

Act together with other employees for your benefit and protection;

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees because they filed or threatened to file charges or have given testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Brandi Campbell full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Brandi Campbell whole for any loss of earnings and other benefits resulting from her unlawful discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Brandi Campbell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to our unlawful discharge of Brandi Campbell, and we will notify her in writing that this has been done and that the discharge will not be used against her in any way.

NOLAN ENTERPRISES, INC. D/B/A CENTERFOLD CLUB

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/09-CA-220677 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.